

Claimant requests review of whether the ALJ erred in not finding claimant's injury the prevailing factor in his need for treatment. Claimant argues that there is no medical evidence in the record to support a conclusion other than the prevailing factor for claimant's

left hip and low back injuries was his work-related accident. Claimant did not dispute the ALJ's findings on date of accident and timely notice.

In respondent's brief to the Board, it questions the ALJ's findings on date of accident and timely notice. Respondent also contends claimant did not sustain an accident arising out of and in the course of his employment and he did not prove his work-related injury was the prevailing factor in his condition and need for medical treatment. Respondent argues that claimant's claim should be denied.

The issues before the Board are:

1. What is claimant's date of accident?
2. Did claimant give timely notice of the accident to respondent?
3. Did claimant prove his work-related injury was the prevailing factor causing his condition and need for current medical treatment?

FINDINGS OF FACT

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant's Testimony at his June 6, 2012 Deposition:

Amado Hernandez worked approximately 18 years as a dishwasher for respondent. Claimant's primary language is Spanish and he does not understand English. He required an interpreter at his deposition and the preliminary hearing. Claimant was born in 1942 and had lived in Garden City, Kansas, the last 26 years. He only works four or five hours a day for respondent, and did not work for anyone else. Claimant testified his accident occurred on January 30, 2012, at 3 p.m. and gave the following description of what happened:

I had the big trash container and I was trying to throw the trash in the other container, and a big wind came up and it pushed me and I hit myself here (indicating).¹

Claimant testified that as a result of the January 30, 2012, accident, he injured his left hip joint and low back area. He told a cook, Aid, about the accident. On the day of the accident claimant also reported that he broke his foot to Josh, a manager. Claimant asked Josh to go home because claimant had hurt himself at work. According to claimant, Josh

¹ Hernandez Depo. at 10.

speaks Spanish. Claimant testified that he has not worked since the day of the accident because he is unable to work. No accident report was completed as claimant testified he did not “understand about those things.”²

Claimant testified he sought treatment on his own on January 31, 2012, from Dr. Zegarra at a clinic in Garden City, Kansas. The records of Dr. Zegarra were not placed into evidence. Claimant testified Dr. Zegarra prescribed some medication and referred claimant to a hospital for x-rays.

The next physician claimant went to see was “Dr. Marsha.” Claimant testified that “Dr. Marsha” took x-rays on the same day her husband performed surgery on claimant for an unrelated medical condition. According to claimant he was given a note by Dr. Marsha, who is actually Marcia Snodgrass, a nurse practitioner in Dodge City, Kansas. Her husband is Dr. Richard Snodgrass. Claimant provided the note to Josh, but could not remember the date. He was prescribed medication by Ms. Snodgrass and she referred claimant to Dr. Bill Garcia in Garden City, Kansas. Claimant testified that he also saw Dr. Pedro Murati in Wichita for his injuries.

Claimant testified Kevin Schmidt was the manager of the respondent’s restaurant where claimant worked, and Josh was a manager, but was “the lesser one.”³ Claimant acknowledged he never discussed the accident with Mr. Schmidt since he does not speak Spanish.

Claimant’s Testimony at the Preliminary Hearing:

Claimant testified that he was employed by respondent for 16 years. He was hit by a 50-60 pound trash can on the left hip on February 9, 2012, at about 3 p.m. There were no witnesses to the accident. On the same day he told Josh about the work-related accident and described how it occurred. Claimant initially thought he had his accident on a Monday, but later changed his mind to Tuesday. He saw Dr. Zegarra on February 10, 2012.

On February 17, 2012, claimant was seen by Marcia Snodgrass, N.P., at C & S Medical Clinic PA in Dodge City, Kansas. Claimant was told by Ms. Snodgrass the ball joint in his left hip was out of place. That was the day he was given a piece of paper by Ms. Snodgrass, which claimant testified he gave to Josh the same day. Upon cross-examination, claimant admitted telling Ms. Snodgrass the hip injury occurred three weeks earlier.⁴

² *Id.*, at 14.

³ *Id.*, at 21.

⁴ P.H. Trans. at 24-25.

Summary of Exhibits Introduced by the Parties at the Preliminary Hearing:

Respondent introduced a document signed by Mr. Schmidt which was dated March 28, 2012. Mr. Schmidt stated in the document that claimant had never reported a work-related injury and that claimant's last day of work was February 9, 2012. The document indicated claimant was a no-show for work on February 10 and February 12, 2012. Respondent contacted claimant's family, who informed respondent that claimant was ill.

Ms. Snodgrass' notes from claimant's initial visit on February 17, 2012, indicated claimant had an onset of left hip pain three weeks earlier when he was lifting an outdoor trash can. Dr. Jonathan Hart, a radiologist, reviewed x-rays of claimant's left hip. His impressions were: 1) the x-rays did not reveal any fractures or dislocation; 2) the images were suboptimal with suboptimal film penetration; and, 3) mild left hip degenerative change without significant joint space narrowing. Chronic enthesopathic changes at the left iliac crest were noted. No aggressive osseous features were detected.

Claimant had one appointment with Dr. Garcia on March 19, 2012. Dr. Garcia's notes indicated claimant had a work-related accident on February 18, 2012, when claimant was emptying trash. Dr. Garcia described the circumstances of the accident as follows, "A trash bin struck claimant 'on the lateral portion of the buttocks above the iliac crest.'"⁵ His diagnosis was that claimant had a contusion on the left hip, degenerative osteoarthritis of the lumbar spine, a possible herniated disc at L5 with nerve radiculopathy.

At the request of his attorney, claimant was evaluated on May 9, 2012, by Dr. Pedro Murati, a physical medicine and rehabilitation specialist. Dr. Murati's report is somewhat confusing as it contains dates and other facts that are inconsistent and incorrect. In the caption of his report, Dr. Murati indicated claimant was born in 1961. However, in the part of his report entitled "Presents," Dr. Murati describes claimant as a 69-year-old Hispanic male. The report's caption states claimant was injured on February 12, 2012. Later in the report, Dr. Murati indicated claimant's date of accident was February 20, 2012. Under the section of his report entitled "Plan/Recommendations," Dr. Murati stated claimant's date of accident was January 30, 2012.

Dr. Murati ultimately diagnosed claimant with left SI joint dysfunction, left hip pain due to radiculopathy and low back pain with signs and symptoms of radiculopathy. He recommended claimant receive further medical treatment including cortisone shots and physical therapy. He also recommended claimant should undergo an MRI of the lumbar spine and gave claimant temporary restrictions. Dr. Murati opined:

⁵ *Id.*, Cl. Ex. 3.

He has significant pre-existing injuries that could be related to his medical conditions. However these were asymptomatic prior to the accident at work. Also he has no history of hobbies. His wife confirms that all he has done for the last 17 years while employed at the Golden Corral is work there and come home to rest. Therefore the multilevel disc disease is as a result from the repetitive bending and lifting as a dishwasher at Golden Corral. He has significant clinical findings that have given him diagnoses consistent with his described injury at work. Therefore it is under all reasonable medical certainty, the prevailing factor in the development of his conditions, is a described accident at work and a subsequent lack of appropriate treatment.⁶

Claimant's Application for Hearing lists date of accident as "1-3-12 and/or on or about 2-9-12 and/or on or about 2-13-12 and/or on or about 2-14-12."⁷

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁸ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."⁹

In the record, there are four possible dates of accident listed in claimant's Application for Hearing, three in Dr. Murati's report and one in Dr. Garcia's notes. Claimant testified that he was injured on January 30, 2012, but later said his accident occurred on February 9, 2012. Ms. Snodgrass' February 17, 2012 notes, indicated claimant gave a history of having an accident three weeks earlier. The date of accident section of claimant's Application for Hearing was completed in an imprecise and haphazard manner. The listing of several possible accident dates only served to muddy the waters.

This Board Member affirms the finding of ALJ Fuller that February 9, 2012, was claimant's date of accident. Claimant testified at the preliminary hearing that the accident occurred on February 9, 2012, and that was his last day of work. Mr. Schmidt's written document corroborated claimant's testimony that his last day at work was February 9, 2012. At the preliminary hearing, claimant testified he first sought medical treatment for his injuries on February 10, 2012.

⁶ *Id.*, Cl. Ex. 2.

⁷ Application For Hearing (filed Apr. 3, 2012).

⁸ K.S.A. 2011 Supp. 44-501b(c).

⁹ K.S.A. 2011 Supp. 44-508(h)

Claimant's testimony that he reported the work-related accident on the same day to Josh, a manager, is uncontroverted. Josh did not testify. Mr. Schmidt's statement indicated he was unaware of the accident. However, claimant testified he did not tell Mr. Schmidt about the accident. As required by K.S.A. 2011 Supp. 44-520, claimant gave notice on the date of the accident to his supervisor, Josh, and provided details as to the date, time, place, person injured and particulars of the injury.

As this claim is at the preliminary hearing stage, the paramount issue is whether claimant's work accident is the prevailing factor causing his present need for medical treatment. K.S.A. 2011 Supp. 44-508(f) states in part,

(B) An injury by accident shall be deemed to arise out of employment only if:

- (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
- (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2011 Supp. 44-508(g) defines prevailing as:

'Prevailing' as it relates to the term 'factor' means the primary factor, in relation to any other factor. In determining what constitutes the 'prevailing factor' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Claimant testified he sustained left hip and low back injuries as a result of his accident. He had no prior work-related or non-work-related accidents. There was no evidence presented to indicate claimant had low back or hip pain or that it was symptomatic before his accident. Claimant's testimony was consistent with the exception of date of accident. Claimant does not understand English and may have been confused. He consistently attributed his injuries to the incident of the trash can falling against his left side and buttocks.

The only medical provider that offered an opinion on causation was Dr. Murati. Dr. Murati's report did not accurately pinpoint claimant's date of accident. There are also questions concerning Dr. Murati's understanding about the nature of claimant's accident. Although claimant told Dr. Murati the injuries occurred in a single traumatic accident, Dr. Murati's report indicates claimant's repetitive work activities caused his multilevel disc disease.

Claimant points out that Dr. Murati's opinion on causation is uncontroverted. Respondent questions the credibility of Dr. Murati's opinions. This Board Member is mindful of the well-established maxim of workers compensation law that uncontradicted

evidence which is not improbable or unreasonable will not be disregarded unless it is shown to be untrustworthy.¹⁰ While Dr. Murati's report is convoluted, as it confuses claimant's date of accident and age, it is not improbable or unreasonable.

After taking into consideration claimant's testimony and Dr. Murati's uncontroverted opinion on causation, this Board Member finds that claimant proved his work accident was the prevailing factor causing his need for current medical treatment. Also, ALJ must have found him credible if she found he did suffer a work-related accidental injury.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹¹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹²

CONCLUSION

1. Claimant's date of accident was February 9, 2012.
2. Claimant gave timely notice of his accident to respondent.
3. Claimant proved his work-related injury was the prevailing factor in his condition and need for medical treatment.

WHEREFORE, it is the finding of this Board Member that the Order Denying Compensation of Administrative Law Judge Pamela J. Fuller dated July 11, 2012, is modified to find that claimant's work-related injury was the prevailing factor in his condition and need for medical treatment. ALJ Fuller's findings concerning date of accident and timely notice are affirmed. This claim is remanded to ALJ Fuller for further orders on claimant's request for preliminary benefits consistent with this Order.

IT IS SO ORDERED.

Dated this 28th day of August, 2012.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

¹⁰ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

¹¹ K.S.A. 44-534a.

¹² K.S.A. 2010 Supp. 44-555c(k).

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